92-1488

No.

Supreme Court
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IN THE

Supreme Court of the United States

October Term, 1992

ROGER A. PETERSON,

Petitioner,

v.

R. H. STAFFORD,
the Washington County Auditor,

Respondent,

and

JOAN ANDERSON GROWE,
the Secretary of State,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a Minnesota statute which provides ballot advantages to incumbent judicial candidates, as illustrated below, violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, notwithstanding that the Minnesota Constitution requires fair elections for judicial positions.

JUDICIAL OFFICES

ASSOCIATE JUSTICE
SUPREME COURT
(GARDEBRING SEAT)
(Vote For One)

SANDRA GARDEBRING INCUMBENT

ROGER A. PETERSON

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ROGER A. PETERSON,

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R. H. STAFFORD, THE WASHINGTON COUNTY AUDITOR,

RESPONDENT,

and

JOAN ANDERSON GROWE, THE SECRETARY OF STATE,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

The Petitioner, Roger A. Peterson, respectfully requests this Court to issue a Writ of Certiorari to review the judgment of the Supreme Court of the State of Minnesota entered in this action on December 1, 1992.

OPINIONS BELOW

The decision of the Supreme Court of the State of Minnesota holding that Minn. Stat. §204B.36, subd. 4, which prescribes that on the official ballot the judicial seats to be voted upon be designated as the "(last name of the incumbent) seat" and Minn. Stat. §204B.36, subd. 5, which mandates an incumbency designation on the ballot do not violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution

is reported as *Roger A. Peterson v. R.H. Stafford, Washington County Auditor and Joan Anderson Growe, Secretary of State*, 490 N.W.2d 418 (Minn. 1992). This decision is reprinted in Pet. App. p. 18A.

JURISDICTION

In the initial proceeding in this matter, Petitioner filed his petition directly with the Minnesota Supreme Court (Pet. App. p.18A). The Minnesota Supreme Court has original jurisdiction in any case where an individual charges an error by the Secretary of State in the preparation of official election ballots. Minn. Stat. §204B.44 (1992). The oral judgment of the Supreme Court of Minnesota denying Mr. Peterson's petition was issued on September 23, 1992, the same day that the Court heard the oral arguments in the matter. A written opinion was issued October 9, 1992, and judgment was entered December 1, 1992.[1] Although the November, 1992 election has been held, the issues presented herein are not moot, because they are "capable of repetition, yet evading review." *Storer v. Brown*, 94 S.Ct. 1274, 1282 n.8 (1974) *citing Rosario v. Rockefeller*, 93 S.Ct. 1245, 1249 n.5 (1973); *Dunn v. Blumstein*, 92 S.Ct. 995, 998 n.2 (1972). As in *Storer*, although the election is long over "and no effective relief can be provided to the candidates or voters, ... this case is not moot, since the issues properly presented, and their effects on independent candidacies will persist as the ... statutes are applied in future elections." *Id.* at 1282 n.8. Additionally, Roger Peterson intends to run again for election to the Minnesota Supreme Court in the future, and therefore, will be

[1] 28 U.S.C. §2101(c) provides that "any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after entry of such judgment or decree." Under Minn. Civ. App. R. Rule 136.02 entry of judgment does not occur until at least 30 days after judgment is issued. *See also Marquette National Bank of Minneapolis v. First of Omaha Service Corp.*, 99 S.Ct. 540, 545 n. 18 (1978).

once again subject to the same statutorily created disadvantage imposed on non-incumbent candidates.

The United States Supreme Court has jurisdiction to review the final judgment rendered by the Minnesota Supreme Court "where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution." 28 U.S.C. §1257.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Fourteenth Amendment.

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Minnesota Constitution, Article VI, §7.

> Term of office; election. The term of office of all judges shall be six years and until their successors are qualified. They shall be elected by the voters from the area which they are to serve in the manner provided by law.

Minnesota Statute §204B.35, subd. 2 (1992).

> **Manner of preparation.** Ballots shall be prepared in a manner that enables the voters to understand which questions are to be voted upon and the identity and number of candidates to be voted for in each office and to designate their choices easily and accurately. The name of a candidate *shall not appear on a ballot in any way that gives the candidate an advantage over an opponent, including words descriptive of the candidate's occupation, qualifications, principles, or opinions, except as otherwise provided by law* (emphasis added).

Minnesota Statute §204B.36, subd. 4 (1992).

> **Judicial candidates.** The official ballot shall contain the names of all candidates for each judicial office and shall state the number of those candidates for whom a voter may vote. The title of each judicial office shall be printed on the official primary and general election ballot as follows:
>
> (a) In the case of the supreme court:
> "Chief justice (or associate justice)—supreme court (last name of incumbent) seat";
>
> (b) In the case of the court of appeals:
> "Judge—court of appeals (last name of incumbent) seat";
>
> (c) In the case of the district court:
> "Judge—(number) district court (last name of incumbent) seat"; or
>
> (d) In the case of the county court:
> "Judge—(number) county court (last name of incumbent) seat."

Minnesota Statute §204B.36, subd. 5 (1992).

> **Designation of incumbent; judicial offices.** If a chief justice, associate justice, or judge is a candidate to succeed again, the word "incumbent" shall be printed after that judge's name as a candidate.

Minnesota Statute §204B.44 (1992).

> Any individual may file a petition in the manner provided in this section for the correction of any of the following errors, omissions or wrongful acts which have occurred or are about to occur:
>
> * * *
>
> (d) Any wrongful act, omission, or error of any election judge, municipal clerk, county auditor, canvassing board or any of its members, the secretary of state, or any other individual charged with any duty concerning an election.

> The petition shall describe the error, omission or wrongful act and the correction sought by the petitioner. The petition shall be filed with any judge of the supreme court in the case of an election for state or federal office . . . . The petitioner shall serve a copy of the petition on the officer, board or individual charged with the error, omission or wrongful act, and on any other party as required by the court. Upon receipt of the petition the court shall immediately set a time for a hearing on the matter and order the officer, board or individual charged with the error, omission or wrongful act to correct the error or wrongful act or perform the duty or show cause for not doing so. The court shall issue its findings and a final order for appropriate relief as soon as possible after the hearing. Failure to obey the order is contempt of court.

STATEMENT OF THE CASE

The Petitioner below, Mr. Peterson, filed his Petition on September 1, 1992, citing as error the statutory requirement that there appear on the official ballots for judicial elections the designation of "incumbent" after the name of a judicial candidate to succeed again and that the judicial seat to be voted upon be labelled as "Chief justice (or associate justice)—supreme court (last name of incumbent) seat", i.e. as in this race, "Associate Justice - Supreme Court (Gardebring Seat)."

The citizens of each state freely chose the method whereby their judges and justices would be selected and that particular method was incorporated into the various state constitutions. In states such as Minnesota, where the citizens ratified a constitution that requires the election of judges and justices, the State is constitutionally bound to conduct all elections in a free and impartial manner. Minnesota's statutorily mandated designations clearly grant an advantage to incumbent judicial candidates over their challengers. This statute denies equal protection of the law to all the non-incumbent candidates for judicial office and to all the citizens who cast votes for the non-incumbent candidates. It, therefore, violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

The parties submitted written briefs on the state and federal constitutional issues involved and the Minnesota Supreme Court heard oral arguments on September 23, 1992. The Court issued an oral opinion denying Mr. Peterson's Petition on September 23, 1992, and a written opinion on October 9, 1992. The judgment of the court was entered December 1, 1992.

STATEMENT OF FACTS

Roger A. Peterson is a citizen of the State of Minnesota and has been licensed as an attorney in Minnesota since 1959. He is a resident and registered voter of Washington County, Minnesota.

At the time he filed for the position of associate justice of the Minnesota Supreme Court he met all of the requirements established for candidates to judicial office in Minnesota. "Judges of the supreme court and the district court shall be learned in the law." Minnesota Constitution, art. VI, §5. "Learned in the law" has been defined to mean that a candidate for the supreme court or district court be admitted or entitled to be admitted to practice as an attorney at law in this state. *In re Scarrella*, 221 N.W.2d 562, 563 (Minn. 1974). Mr. Peterson timely filed for the position of associate justice of the Minnesota Supreme Court on July 21, 1992. When he filed, he and all other candidates were required to file for a specific seat occupied by a specific justice pursuant to Minn. Stat. §204B.06, subd. 6 (1992). Mr. Peterson filed for the seat held by Justice Sandra Gardebring. No candidates other than Mr. Peterson and Justice Gardebring filed for that position, but other candidates filed to run against other specific justices.

On August 28, 1992, Mr. Peterson obtained his absentee ballot for the primary election from the Washington County Auditor's Office. There was no primary election for the seat which Mr. Peterson had filed for because only two candidates had filed for the particular position. The ballot listed two judicial seats on the State Supreme Court to be voted upon in the primary election. They appeared as follows:

JUDICIAL OFFICES

CHIEF JUSTICE
SUPREME COURT
(KEITH SEAT)
(VOTE FOR ONE)

ROSS A. PHELPS

MICHAEL C. DEMOSS

A.M. (SANDY) KEITH INCUMBENT

ASSOCIATE JUSTICE
SUPREME COURT
(YETKA SEAT)
(VOTE FOR ONE)

ALAN C. PAGE

EDWARD W. BEARSE

KEVIN JOHNSON

(App. p. 23A). The wording of the ballot conforms with the language prescribed by Minn. Stat. §204B.36, subds. 4 and 5 (1992).

In regards to the associate justice seat above designated (Yetka Seat) no incumbent was designated because Judge Yetka's attempt, pursuant to Minn. Stat. §490.124, subd. 2 (1990), to have his term extended to avoid the election was declared in violation of the Minnesota Constitution in a proceeding initiated by candidate, now justice, Alan C. Page, who argued to a specially appointed seven member court of all retired judges. The Court determined that it was necessary to "appoint and impanel neutral and disinterested members of the judiciary to serve as the Supreme Court by designation." Order of the Minnesota Supreme Court issued July 22, 1992, in *Page v. Carlson*, 488 N.W.2d 274 (Minn. 1992).

The statutory provisions apply to the general election ballots as well as primary election ballots. Mr. Peterson believed, therefore, that designations similar to those that appeared on the primary ballot would appear on the general election ballot when he would be a candidate for an associate justice position. He, therefore, filed a petition with the Minnesota Supreme Court requesting the Court, or a specially appointed court, review these provisions and rule upon their constitutionality.

Unlike the *Page* proceeding argued one month earlier, four members of the Minnesota Supreme Court and one retired judge, appointed by the four sitting justices, heard oral arguments on the Petition on September 23, 1992. Justice Yetka and the colleagues and peers of the three incumbent justices who were required to run for election sat in judgment on the issues presented herein. The court, in its opinion, explained the composition of the court.

> [T]he members of this court who have not exercised their right to recusal have concluded that it is not only appropriate, but necessary in fulfillment of our judicial responsibility to hear and decide this controversy. The circumstances relating to the term of office of each participating justice and the operation of Minn. Stat. §§490.121, subd. 12 and 490.125 (1990), the mandatory judicial retirement law, make certain the fact that not one member participating in this proceeding will ever stand again for judicial election in the State of Minnesota and that, accordingly, there can be neither the potential for nor the perception of a conflict of interest.

Peterson v. Stafford, 490 N.W.2d at 418 n. 1 (App. p. 3A).

The Court issued an oral opinion denying the Petition on September 23, 1992. The Minnesota Supreme Court's written opinion, issued October 9, 1992, includes a discussion of the historical development of Minnesota's judicial selection process. *Id.* at 420-423. The Court observed that the framers of

the constitution decided on the election process for the selection of all judges and justices. We observe that while the framers of the Minnesota Constitution were fully aware of the judicial selection alternatives including the appointment for life process followed in the federal justice system, they chose to adopt an election process to select judges and justices.

In years subsequent to the adoption of the judicial election procedure several committees suggested the amendment of Minnesota's judicial selection process. The first time suggestions were made to change the selection process occurred in 1948 when a special constitutional convention recommended extensive revisions to the judicial article of the state constitution to alter the fundamental election process. *Id.* at 420. In 1972, a constitutional study commission subcommittee recommended that the basic structure of the judiciary be changed and that a "Missouri plan"-type selection process be adopted by amending the Minnesota Constitution.[2] *Id.* at 422-423. On both occasions, twenty-four years apart, the legislature rejected the recommendations and the proposed amendments were never submitted to the voters of the state. Gwenyth Jones, *By the People? Judicial Selection in Minnesota*, The Bench and Bar of Minnesota, Feb. 1993, at 17. Consequently, all judges in the state are still elected pursuant to the provisions of the Minnesota Constitution. *Peterson v. Stafford*, 490 N.W.2d at 423. The court concluded from the historical development of Minnesota's judicial selection process that although no substantial amendments were made to the election process by the voters, changes were made by statute. *Id.* at 423-425.

---

[2]"The Missouri plan has been simply defined as follows: Under this plan, when a vacancy in a judicial office occurs, a non-partisan judicial commission submits the names to the governor who appoints one of them to fill the vacancy. After holding office for a limited period, the name of the appointee is submitted to the electorate without a competing candidate on the question: 'Shall Judge _____ be retained in office?' If a majority of the votes cast on the question are in the affirmative, the appointee remains in office for a new and full term. If the vote is in the negative, the process is repeated." *Peterson v. Stafford*, 490 N.W.2d at 422 n.17 (citation omitted).

The court asserts that these suggestions by legislative committees demonstrate their recognition of the tensions inherent in the judicial selection process prescribed by the state constitution. *Id.* at 422. The suggested constitutional amendments were never submitted to the voters by the state, rather the legislature "has provided its own variation of the election process." *Id.* at 423. This legislative variation involves permitting a judicial appointee at least one year in office before they are required to stand for election to that position. The additional time period was "to allow the public to reflect favorably or unfavorably on a judge's competence in office." *Id.* at 423. Additionally, when the incumbent judge's position is finally placed on the ballot to be voted upon, he is designated as an incumbent. *Id.* at 423. (This incumbency designation provision appears to assume that although the public has had at least a year to evaluate the performance of a judge, they still need assistance in identifying the judge they were to be evaluating.)

The court applied the rational basis test analysis to the ballot designation provisions. *Id.* at 423. The court, recognized that such designations "may provide the incumbent with an advantage over other candidates", but stressed that their purpose was "informational". *Id.* at 423.

The court, in its only reference to the designation of the seat to be voted upon as the incumbent's seat, stated that "[a] logical extension and application of the 'separate seat' concept of a judicial office is that the legislature is authorized to select a manner of identification of that seat which promotes and clarifies the distinction between the separate offices." *Id.* at 424. The court permits this designation as constitutionally acceptable despite the fact that each position to be voted upon is already separately listed as "Associate Justice" or "Chief Justice" and that only the candidates who filed for that particular position are listed under

the position heading. Mr. Peterson asserts that these two ballot format provisions are all that is necessary to allow the voter to determine for what position she is voting.

The court, in upholding the designation stated:

> Whatever advantage there may be to the incumbent from the incumbency designation on the ballot, it is clear that the overriding purpose of the ballot designation has been to assure an able, independent and stable judiciary while at the same time requiring incumbent judges to submit to voter appraisal in an open election.

Id. at 424.

The court concluded that:

> Minnesota has adopted its own middle-of-the-road approach to judicial selection. The open election process has been retained, but with a *quasi-retention feature* which simply informs the voter, without comment, who is the incumbent candidate whose performance is under review and who is the non-incumbent challenger (emphasis added).

Id. at 425. The so-called "quasi-retention feature" is embodied in the legislation which provides a two-step process of designations on the election ballots: First, Minn. Stat. §204B.36, subd. 4, adopted in 1973, provides that the title of the judicial office to be voted upon be listed as the incumbent's seat (i.e. "Gardebring Seat"); Second, Minn. Stat. §204B.36, subd. 5, passed in 1949, requires that the candidate to succeed again be labelled the "incumbent". Mr. Peterson, in his position as both a registered voter and a qualified candidate for judicial office, challenged these designations as violative of the Minnesota Constitution and of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

The Minnesota Supreme Court denied Mr. Peterson's Petition.

This appeal followed.

REASONS FOR GRANTING THE WRIT

1. The decision of the Minnesota Supreme Court is in error because it permits the State to interfere with the electorates' fundamental constitutional right to vote and the corresponding rights to cast their votes unimpeded by state influence for the candidate of their choice. This practice violates the Equal Protection Clause of the Fourteenth Amendment.

2. The decision of the Minnesota Supreme Court is in error because it permits the State to continue to use a ballot format that enables the State to provide advantages to incumbent judges challenged by non-incumbent candidates. This ballot format violates the Equal Protection Clause of the Fourteenth Amendment.

3. There exists a conflict between various state and federal courts regarding the constitutionality of incumbency designations on election ballots. The Minnesota Supreme Court's decision to uphold a statute that is, in effect, an "incumbent first" statute is in conflict with numerous other state and federal court decisions.

The decision of the Minnesota Supreme Court permits the continued violation of the fundamental right of all voting Minnesotans to cast their votes without state influence and also permits the continued denial of equal protection to all non-incumbent judicial candidates in the State of Minnesota. The Court should grant this Petition to end the violation of the Equal Protection Clause of the Fourteenth Amendment and to resolve the conflict among the circuits by declaring such "voting cues" to violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

I.

THE DECISION OF THE MINNESOTA SUPREME COURT UPHELD A STATE STATUTE THAT IMPAIRS THE FUNDAMENTAL RIGHT TO VOTE AND VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

A. The Right To Vote Is A Fundamental Right Protected From Unconstitutional State Infringement By The Equal Protection Clause Of The Fourteenth Amendment.

> Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a *free and unimpaired manner* is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. (Emphasis added.)

Harper v. Virginia State Board of Election, 86 S.Ct. 1079, 1982 (1966) *quoting Reynolds v. Sims*, 84 S.Ct. 1362, 1381 (1964); *see also Lubin v. Panish*, 94 S.Ct. 1315, 1322 (1974); *Yick Wo v. Hopkins*, 6 S.Ct. 1064, 1071 (1886). "[T]he right to vote in federal elections is conferred by Art. I, §2 of the Constitution, . . . the right to vote in state elections is nowhere expressly mentioned. It is argued that the right to vote in state elections is implicit, particularly by reason of the First Amendment . . . ." *Id.* at 1080 (citation omitted). "While it is true that the administration of the electoral process is a matter that the Constitution largely entrusts to the states, Art. I, §2, Art. II, §1, in exercising their powers of supervision over elections 'the state may not infringe upon basic constitutional protections', and 'unduly restrictive state election laws may so impinge upon freedom of association as to run afoul of the First and Fourteenth Amendments.'" *Riddell v. National Democratic Party*, 508 F.2d 770, 776-777 (5th Cir. 1975) *quoting Kusper v. Pontikes*, 94 S.Ct. 303, 307 (1973). Clearly, the state's power to legislate and reg-

ulate election practices for state as well as federal offices must be exercised within the boundaries of the federal constitution.

The Minnesota state legislature has considerable discretion in organizing and supervising state elections. However, the state must ensure that it exercises its power consistent with the Equal Protection Clause of the Fourteenth Amendment. In the current matter, the Minnesota Supreme Court has upheld a statute that permits the State to influence the outcome of judicial elections by providing "voting cues" which favor incumbent candidates. Such "voting cues" influence the outcome of elections and prevent all qualified voters from exercising their franchise in "a free and unimpaired manner."

B. The Right To Vote And The Right To Be A Candidate Are Inexorably Connected.

The issues presented in this case are difficult to classify. The state statute specifying ballot format does not involve absolute exclusion of a particular candidate, however, the manipulation of the information provided on the ballot has an effect on the fundamental right to vote. *McLain v. Meier*, 637 F.2d 1159, 1167 (8th Cir. 1980). The states' legitimate interest in regulating ballot format

> must be achieved by a means that does not unfairly or unnecessarily burden either a minority party's or an individual candidate's equally important interest in the continued availability of political opportunity. The interests involved are not merely those of parties or individual candidates; the voters can assert their preferences only through candidates or parties or both and it is this broad interest that must be weighed in the balance. *The right of a party or an individual to a place on a ballot is entitled to protection and is intertwined with the rights of voters*.

Lubin v. Panish, 94 S.Ct. at 1320 (1974) (emphasis added).

The rights of voters and the rights of candidates are not easily separated. *Bullock v. Carter*, 92 S.Ct. 849, 856 (1972). "[A]ny restrictions on ballot access by candidates necessarily burdens

the rights of their supporters to some extent." *Rosen v. Brown*, 970 F.2d 169, 175-176 (6th Cir. 1992), *citing Cromer v. State of South Carolina*, 917 F.2d 819, 822 (4th Cir. 1990).

The intertwined rights of voters and candidates are related to the right of the voters to be allowed the opportunity to "cast their votes effectively." *Williams v. Rhodes*, 89 S.Ct. 5, 10 (1968). The First Amendment protects the right to cast a meaningful vote for a candidate of one's choice. *Rosen v. Brown*, 970 F.2d at 176, *citing Dart v. Brown*, 717 F.2d 1491, 1504 (5th Cir. 1983) *cert. denied*, 469 U.S. 825 (1984). This right, however, is infringed upon when the state provides "voting cues" on ballots favoring one candidate over others and making it virtually impossible for a non-favored candidate to prevail in an election. *Rosen v. Brown*, 970 F.2d at 176.

The facts in *Rosen v. Brown* bear a striking resemblance to the facts in the current matter. Rosen was an independent candidate for a seat in the Ohio House of Representatives. He secured a place on the ballot, but the State refused to designate him as an Independent on the ballot, despite the fact that candidates nominated by a political party were designated as that party's candidate. *Id.* at 174. The court found that the State provided a "voting cue" to those who wanted to vote for a Democratic or Republican candidate thus providing an advantage to party candidates. *Id.* at 176.

In ascertaining whether the election laws violated the federal constitution the court applied the test set forth in *Anderson v. Celebrezze*, 460 U.S. 780, 789, 103 S.Ct. 1564, 1570 (1983). The court determined that the state election code burdened the First Amendment rights of voters to cast their votes effectively and that the statute violated the Equal Protection Clause of the Fourteenth Amendment "because it places unequal burdens on Independent and third party candidates and is designed to give Democrats and Republicans a decided advantage at the polls in a general election." *Id.* at 177-178.

Similarly, Minnesota's legislature has provided three voting cues in judicial elections; the designation of the position to be voted upon as the incumbent's seat by using the incumbent's surname (i.e., Gardebring Seat) and always placing that seat identification on top of the list of candidates, and third, the printing of the incumbency designation beside the name of the candidate to succeed again. These voting cues provide advantages to incumbents that are virtually impossible for the challenging non-incumbent candidate to overcome. The statute must, therefore, be found to violate the Fourteenth Amendment.

C. The Minnesota Supreme Court Erred When It Applied The Rational Basis Test In Its Analysis Of The Incumbency Designations.

In its analysis of the judicial election provisions, the Minnesota Supreme Court used a standard of review that is "something akin to the rational basis test." *Peterson v. Stafford*, 490 N.W.2d at 423. The court erred.

An equal protection challenge to a statute charged with directly affecting the electoral process, the fundamental nature of the right to vote, and the importance of preserving the integrity of the franchise necessarily raises the level of judicial scrutiny. *Gould v. Grubb*, 536 P.2d 1337, 1342 (Calif. 1975). Where a "classification scheme imposes a very 'real and appreciable impact' on the equality, fairness and integrity of the electoral process, that scheme is subject to strict judicial scrutiny." Id. at 1342-1344, *citing Bullock v. Carter*, 405 U.S. at 143. Under this standard, the statute can be upheld only if the state can "demonstrate that the classifications drawn are *necessary* to achieve a *compelling* government interest." *Id.* at 1344.

In the alternative, the court could have applied the test set forth by this Court in *Anderson v. Celebrezze*, 103 S.Ct. at 1570. It is an analytical process for making such "hard judgments" in the context of a challenge to a provision of a state's election laws.

> [A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Id. at 1570.

Under either the strict scrutiny test or the *Anderson* balancing test, the challenged judicial election statute fails to pass constitutional muster[3]. The statute burdens the First Amendment rights of those voters who work to effectively vote for the non-incumbent candidate. The statute also violates the Equal Protection Clause of the Fourteenth Amendment because it places an unequal burden on non-incumbent candidates and is designed to give incumbents an advantage. When these concerns are balanced with the state's justification that the statute provides information to the voters, the provisions are clearly unconstitutional, under any level of scrutiny, and must be declared invalid.

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[3]In *McLain v. Meier*, 637 F.2d at 1167, the court stated that it was unclear as to which standard to apply. The court found, however, that an "incumbent first" statute (which is similar to Minnesota's designation of the seat as the "incumbent seat") fails to withstand even the minimal requirements of the rational basis test, because the justification was unsound.

II.

THE DECISION OF THE MINNESOTA SUPREME COURT UPHELD A STATE STATUTE THAT ENABLES THE STATE TO PROVIDE ADVANTAGES TO INCUMBENT CANDIDATES OVER ALL OTHER CANDIDATES IN VIOLATION OF THE MINNESOTA CONSTITUTION AND IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

A. States Are Empowered To Regulate Elections, However States May Not Impinge Upon Constitutional Rights.

The source of the infringement of the electorates' right to cast their votes unimpeded is the ballot format for judicial offices prescribed in Minn. Stat. §204B.36. This statute requires that the judicial seat to be voted upon be labelled the incumbent's seat and that the designation appear directly under the position to be voted upon, and that a candidate to succeed herself be designated as an "incumbent". "An election ballot is a State-devised form through which candidates and voters are required to express themselves at the climactic moment of choice." *Rosen v. Brown*, 970 F.2d at 175; *see also Bachrach v. Secretary of Commonwealth*, 382 Mass. 268, 415 N.E.2d 832, 834 (1981) *citing Anderson v. Martin*, 84 S.Ct. 454, 455 (1964). Therefore, when the state designs the format of the ballot it must ensure that it does not violate any constitutional guaranties. *Id.* at 175, *citing Bachrach v. Secretary of Commonwealth*, 415 N.E.2d at 834-35. "The unequal effect flowing from [a] ballot design gives rise to the equal protection question whether the inequality is such as offends the fourteenth amendment." *McLain v. Meier*, 637 F.2d at 1167.

This Court has addressed various equal protection challenges to restrictions which states have attempted to impose on the fundamental right to vote and ballot access: *Anderson v. Celebrezze*, 103 S.Ct. 1564 (1983) (holding early filing date for independent presidential candidates to be an unconstitutional

burden on voting and associational rights of independent candidates' supporters); *Illinois State Bd. of Election v. Socialist Workers*, 99 S.Ct. 983 (1979) (declaring unconstitutional a state requirement that independent candidates and new political parties obtain signatures of large numbers of qualified voters in order to appear on ballot); *Lubin v. Panish*, 94 S.Ct. 1315 (1974) (held that California filing fee requirement unconstitutionally denied indigent candidates access to the ballot); *Storer v. Brown*, 94 S.Ct. 1274 (1974) (finding state statute forbidding ballot position to independent candidates who have registered affiliation with a qualified political party at anytime within one year prior to primary election to be constitutional); *American Party of Texas v. White*, 94 S.Ct. 1296 (1974) (declaring unconstitutional the Texas state practice of printing on absentee ballots only the names of the two major party candidates); *Bullock v. Carter*, 92 S.Ct. 849 (1972) (Court declared primary election filing fee to be unconstitutional); *Williams v. Rhodes*, 89 S.Ct. 5 (1968) (holding that election law making it virtually impossible for new political party to be placed on the ballot results in a denial of equal protection of the laws); *Harper v. Virginia State Bd. of Elections*, 86 S.Ct. 1079 (1966) (holding that Virginia's poll tax was unconstitutional and inconsistent with the Equal Protection Clause); *Anderson v. Martin*, 84 S.Ct. 454 (1964) (Court held that compulsory designation of candidate's race on the ballot violated the Fourteenth Amendment). It is clear from analysis of the above cited cases that

> administration of the electoral process is a matter that the Constitution largely entrusts to the States. But, in exercising their power of supervision over elections and in setting qualifications for voters, the States may not infringe upon basic constitutional protections.... As the Court made clear in *Williams v. Rhodes, supra*, unduly restrictive state election laws may so impinge upon freedom of association as to run afoul of the First and Fourteenth Amendments.

Kusper v. Pontikes, 94 S.Ct. at 307-308 (1973) (citations omitted).

B. When A State Constitution Provides That A Position Is To Be Elective, That Provision Must Be Given Effect By Ensuring Free And Equal Elections.

Minnesota's Constitution requires that judges and justices be elected.

> The term of office of all judges shall be six years and until their successors are qualified. They shall be elected by the voters from the area which they are to serve in the manner provided by law.

Minn. Const., Art. VI, §7.

Art. VI, §7 clearly states that judges "shall be elected by the voters . . . ." Elections may be broadly defined as an expression of a choice by the body of electors. *Black's Law Dictionary*, 608 (4th ed. 1968). It is an underlying principle of constitutional law that "every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates . . . ." *Gray v. Sanders*, 83 S.Ct. 801, 808 (1963). "The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications." Id. In addition to the voter's right to a free and equal election, all candidates to elected positions have a "federally protected right to application and enforcement of the state law without intentional or purposeful discrimination among them." *Weisberg v. Powell*, 417 F.2d 388, 392 (7th Cir. 1969) *citing Snowden v. Hughes*, 321 U.S. 1 (1944); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

A ballot format, such as Minnesota's, "imposes a very 'real and appreciable impact' on the equality, fairness and integrity of the electoral process." *Gould v. Grubb*, 536 P.2d at 1343, *quoting Bullock v. Carter*, 405 U.S. at 143. The incumbency designations act as voting cues that provide advantages to one group of candidates, the incumbents, and dilute the weight of the votes of all the electors who cast their votes for non-incumbents. *Id.*;

see also McLain v. Meier, 637 F.2d at 1166; Scott, *California Ballot Position Statutes: An Unconstitutional Advantage to Incumbents*, 45 So.Cal.L. Rev. 365, 383-386 (1972); footnote 6, *infra*.

The state legislature, by statutorily providing advantages to judicial incumbents who are required to stand for election by the state constitution, has violated the basic federal constitutional principle that the votes of all qualified electors be equal. The state legislature has created provisions that deny the voters of Minnesota their constitutionally guaranteed right to free and equal elections, thereby violating the Equal Protection Clause of the Fourteenth Amendment.

As has been previously discussed, a state has the right to regulate elections. The power to regulate elections is, however, limited by both the federal constitution and the particular state constitutional provisions. Minnesota's constitution states that judges shall be elected "in the manner provided by law." This clause, however, does not authorize the legislature to provide advantages to incumbent judicial candidates. Petitioner submits that the phrase is limited to laws relative to the conduct of the election in an administrative or procedural sense, and does not authorize the legislature to make substantive changes to a free and unimpaired election process. If the phrase is interpreted to allow the legislature to make substantive statutory changes to the election process, then the legislature could also prescribe, for example, that only incumbents may run, or that only those over 50 years of age may run, or that only those who have been residents of Minnesota for ten years may run. We conclude from these extreme examples, that the proper interpretation of "in the manner provided by law" is limited in scope. The clause relates to defining the judicial districts, the number of judges, the date of elections and the type of ballots, such as written ballots or voting machines ballots, rules regarding absentee voting and other ministerial aspects of the election process.

This interpretation is further supported by the cannons of statutory construction which are also applicable to constitutional interpretation. *Badger v. Hoidale*, 88 F.2d 208 (8th Cir. 1937). One canon of statutory construction states that "[t]he legislature does not intend a result that is absurd, impossible of execution, or unreasonable." Minn. Stat. §645.17(1)(1947). Certainly, if the constitutional clause is interpreted to permit the state legislature to substantively modify the election process without limitation, it is conceivable that the legislature might eliminate elections of judges altogether.

The election process for judges as it currently exists, as statutorily modified, bears little resemblance to elections as they are conducted in most democratic systems and denies free and equal elections to the voters of Minnesota. The Minnesota legislature started down a "slippery slope" when it passed the statute that requires the judicial seat to be voted upon be designated as the incumbent's seat and that the incumbent be so designated on the ballot. If this statute is permitted to stand, it is likely this state will continue its efforts to legislatively change Minnesota's constitution, without submitting the changes to the electors of the State as is required when proposing constitutional amendments. Minn. Const., Art. IX, §1. And, furthermore, the changes may violate the Fourteenth Amendment more severely.

C. Minnesota Law Violates The Equal Protection Clause Of The Fourteenth Amendment By Requiring That A Judicial Incumbent's Name Always Appear At The Top Of The List Of Candidates. The Court's Decision To Uphold This Statute Is In Conflict With Numerous Other Decisions.

State legislatures clearly have considerable discretion in "formulating election procedures and devising regulations for the form and content of ballots." *Gould v. Grubb*, 536 P.2d at 1342; see also, *Sangmeister v. Woodard*, 565 F.2d 460, 465 (7th Cir.

1977); *Kautenberger v. Jackson*, 333 P.2d 293, 294 (Ariz. 1958). The Minnesota state legislature, however, stepped beyond the realm of constitutionally acceptable ballot formats when it passed Minn. Stat. §204B.36, subds. 4 and 5.

Minn. Stat. §204B.36, subd. 4 (1992) provides that the judicial position to be voted upon be listed as the incumbent's seat. Under current state practice, the ballot appeared in the November 1992 election as follows, in part:

ASSOCIATE JUSTICE
SUPREME COURT
(GARDEBRING SEAT)
(VOTE FOR ONE)

SANDRA GARDEBRING INCUMBENT

ROGER A. PETERSON

The designation of the position as "Gardebring Seat" creates the appearance that the position belongs to Justice Gardebring. This designation plants in the minds of the voters an association between the position to be voted upon and the name of the incumbent justice. The State, by requiring the designation, indicates to the voters that this is the incumbent's seat and implies that it should remain so.

An equally important consequence of requiring this format on the ballots is that the incumbent's name will always appear at the top of the list of candidates, despite the statutory requirement that the names of the candidates be rotated within the list.[4] Additionally, this format guarantees that the incumbent's name will always appear twice on the ballot (if the justice is running

[4]Minn. Stat. §204D.08, subd. 3 (1992).

for re-election). The "incumbent first" format for ballots has been invalidated in numerous states.[5]

First place position on the ballot provides an advantage to the candidate placed there, which violates the Equal Protection Clause of the Fourteenth Amendment.[6] The Eighth Circuit recognized this when it stated that "incumbent first" statutes are unconstitutional, furthermore, that "[t]he effect of ballot placement on voting is a matter of fact." *McLain v. Meier*, 637 F.2d at 1166.

In *McLain v. Meier*, 637 F.2d 1159 (8th Cir. 1980), the court invalidated as violative of the federal constitution, an "incumbent first" statute. The North Dakota law reserved the first column on the ballot for the party that had received the most votes in the last congressional election. *Id.* at 1165-1166. The state had justified the placement as a method for "making the ballot as convenient and intelligible as possible for the great majority of voters." *Id.* at 1167.

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[5]The court in *McLain v. Meier*, 637 F.2d at 1167 (8th Cir. 1980) listed cases in which courts have held "incumbent first" statutes to be unconstitutional. *Netsch v. Lewis*, 344 F.Supp. 1280 (N.D. Ill. 1972); *Gould v. Grubb*, 537 P.2d 1337; *Holtzman v. Power*, 313 N.Y.S. 2d 904, 62 Misc. 2d 1029 (1970); *see also Sangmeister v. Woodard*, 565 F.2d 460 (placing Republicans first is unconstitutional); *Weisberg v. Powell*, 417 F.2d 388 (intentional manipulation of ballot placement by Secretary of State so as to give certain candidates first placement is unconstitutional); *Culliton v. Bd. of Election Comm'rs*, 419 F. Supp. 126 (placing Republicans first is unconstitutional); *Mann v. Powell*, 333 F.Supp. 1261 (N.D. Ill. 1969) (unconstitutional to break ties for ballot position so as to favor incumbent); *Kautenberger v. Jackson*, 85 Ariz. 128, 333 P.2d 293 (alphabetical listing is unconstitutional).

[6]The effect of ballot positioning has been recognized in numerous cases and law journal articles. The following articles conclude that the candidate occupying the top position on a ballot is the recipient of a significant number of votes from the "capricious or indifferent" electors. Kelman, *Ballot Designations: A Second Look*, 35 Wayne L. Rev. 63 (1988); Scott, *California Ballot Position Statutes: An Unconstitutional Advantage to Incumbents*, 45 So. Cal. L. Rev. 365 (1972); H. Bain & D. Hecock, *Ballot Position and the Voter's Choice* (1957). The following cases have found a ballot advantage to the candidate listed in the first position. *Weisberg v. Powell*, 417 F.2d 388, 392-93 (7th Cir. 1969); *Culliton v. Bd. of Election Comm'rs. of the County of Du Page*, 419 F.Supp. 126 (N.D. Ill. 1976), *aff'd in part and remanded in part sub. nom. Sangmeister v. Woodard*, 565 F.2d 460 (7th Cir. 1977), *cert. denied, and app. dismissed sub. nom. Illinois State Bd. of Elections v. Sangmeister*, 435 U.S. 39, 98 S.Ct. 1516, 55 L.Ed.2d 535 (1978); *Gould v. Grubb*, 14 Cal.3d 661, 122 Cal. Rptr. 377, 536 P.2d 1337 (1975); *Holtzman v. Power*, 313

The court stated that it was not clear what standard of review to apply to the "incumbent first" statute. The court found, however, that the statute could not withstand even the minimal standard of review because the state's justification was unsound. *Id.* "[The state's] justification virtually admits that the state has chosen to serve the convenience of those voters who support incumbent and major party candidates at the expense of other voters." *Id.* The court found the procedure of listing the incumbent first to be "constitutionally unsound." *Id.*

Gould v. Grubb, 122 Cal. Rptr. 377, 536 P.2d 1337 (Calif. 1975) involved the constitutionality of a charter provision that automatically placed an incumbent in the top position on the ballot. The court found that placement at the top of the list provided the incumbent with an unconstitutional advantage over non-incumbents.

> Indeed, in a close race it is quite possible that a candidate with fewer "conscious" supporters than an opponent will actually win an election simply because his high position on the ballot affords him the advantage of receiving the vote of unconcerned or uninformed voters. *In such an instance, the challenged provision effectively undermines the fundamental democratic election tenant of majority rule.*

Id. at 1343, (citations omitted) (emphasis added). The court does state, in dicta, that a possible alternative to placing the incumbents in the top position is to allow them to designate themselves as incumbents on the ballot if non-incumbents were allowed a similar opportunity as to their occupation. The court stated that a statute that permitted incumbent *and* non-incumbent candidates to list their current occupation, position or other designations on the ballot might well be constitutional. *Id.* at 1343.

N.Y.S.2d 904, 62 Misc.2d 1020, *aff'd mem.* 34 App. Div.2d 917, 311 N.Y.S.2d 824, *aff'd mem.*, 27 N.Y.2d 628, 313 N.Y.S.2d 760, 261 N.E.2d 666 (1970); *Kautenberger v. Jackson*, 85 Az. 128, 333 P.2d 293 (1958); *Elliot v. Secretary of State*, 295 Mich. 245, 294 N.W. 171 (1940). (Cases cited in *McLain v. Meier*, 637 F.2d at 1166-1167).

While the Minnesota legislature has attempted to avoid the appearance of favoring judicial incumbents by requiring that the names of all candidates be rotated upon the ballot, the legislature has ensured that the incumbent's name will always appear first by providing that the position to be voted upon be designated as the incumbent's seat. Minn. Stat. §204B.36, subd. 4. Thus, the incumbent always receives "top billing" and those voters uncertain of whom to vote for merely have to mark their ballots for the candidate whose name matches the name that appears at the top of the list. It is important to note that only judicial incumbents receive these special designations. *No other elected officials in Minnesota are granted the advantage of having the seat they hold designated as their seat on the ballot, nor are they designated as an incumbent on the ballot.* These statutes evidence the legislature's unconstitutional intent to favor judicial incumbents over all other candidates. Furthermore, we submit that the designation of the position as the incumbent's seat, i.e. "(Gardebring Seat)" after the designation of the judicial position to be voted upon does nothing to eliminate any voter confusion, and by virtue of its position is equally as violative of the Constitution as are the "incumbency first" cases.

This Court should grant review of Minnesota's Supreme Court decision because it upholds a statute similar to an "incumbent first" statute that is clearly at odds with decisions of the numerous state and federal courts cited in this section.

D. Minnesota Law Providing Incumbency Designation For Judicial Candidates Violates The Equal Protection Clause Of The Fourteenth Amendment.

Certainly if favoring incumbents by placing them in the first place position on the ballot is unconstitutional, *a fortiori*, the specific designation of "incumbent" is invalid. This Court's only decision on incumbency designation occurred in its summary disposition of *Binkowski v. Miller*, 411 U.S. 901 (1973)[7],

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[7] See discussion of *Binkowski v. Miller* in Kelman, *Ballot Designations: A Second Look*, 35 Wayne L. Rev. 63, 68-71 (1988).

in which the Court merely affirmed the judgment of the lower court permitting incumbent judges to be designated as such upon the ballots. The precedential value of such a summary disposition "extends no further than 'the precise issues presented and necessarily decided by those actions.' A summary disposition affirms only the judgment of the court below, and no more may be read into our action than was essential to sustain judgment." *Anderson v. Celebrezze*, 103 S.Ct. at 1568 n.5 (citations omitted). *Binkowski* has no precedential value in regards to the matter currently before the Court. The incumbency designation at issue in *Binkowski* was specifically permitted by the Michigan Constitution. Mich. Const. Art. VI, §24. The Minnesota Constitution, however, makes no such provision, it states in relevant part, "[all judges] shall be elected by the voters from the area which they are to serve in the manner provided by law." Minn. Const. Art. VI, §7.

Other courts have found incumbency designations to violate the Fourteenth Amendment. In *Rees v. Layton*, 6 C.A.3d 815, 86 Cal. Rptr. 268 (Cal. Ct. App. 1970), the court analyzed a Los Angeles Election Code that forbade any candidate, except an incumbent, from having any designation after his name on the ballot. The court concluded that the ordinance gave "an unfair advantage to incumbents over non-incumbents [and] that there is no rational basis whatsoever for the ordinance. It was an invidious requirement violative of . . . the fourteenth amendment of the federal Constitution . . . . " *Id.* at 823. The California court's decision is clearly in conflict with the Minnesota Supreme Court's decision to uphold as constitutional a similar incumbency designation statute, therefore, this Court should grant the Petition to review that decision.

The history of Minnesota's Constitution includes numerous occasions where it was suggested that the constitution be amended to permit an alternative method of choosing judges and justices. *See Peterson v. Stafford*, 490 N.W.2d at 420-423

(Minn. 1992). However, the method for electing judges prescribed in the constitution was never substantially amended, except for changing the numbers of years in a judicial term. The constitution still requires that judges and justices be elected. The legislature, however, adopted Minn. Stat. §204B.36, subds. 4 and 5, in an attempt to bypass the constitution and provide incumbent judges and justices with an advantage over all other candidates. The legislature has, in effect, amended Minnesota's Constitution without submitting the amendment to the electorate. This is impermissible and, therefore, the resulting designations are violative of the Equal Protection Clause of the Fourteenth Amendment of the Federal Constitution.

CONCLUSION

To resolve whether a state statute that provides voting cues which create ballot advantages for incumbent judicial candidates violates the Equal Protection Clause of the Fourteenth Amendment of the United States as has been held by other circuit and state courts, this Court should grant the Petition and reverse the error of the Minnesota Supreme Court.

Respectfully Submitted,
March 1, 1993

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ROGER A. PETERSON, Petitioner,

v.

R.H. STAFFORD, Washington County Auditor, Joan Anderson Growe, Secretary of State, Respondents.

No. C6-92-1658.

Supreme Court of Minnesota.

Oct. 9, 1992.

Candidate for judicial office filed petition challenging constitutionality of statutes governing judicial elections. The Supreme Court, en banc, Yetka, J., held that, under rational basis test, statute prescribing form of ballot used in judicial elections and statute mandating "incumbency" designation on ballot do not violate equal protection clauses of State or Federal Constitutions.

Petition denied.

Constitutional Law—225.2(6)
Judges - 3

Under rational basis test, statute prescribing form of ballot used in judicial elections and statute mandating "incumbency" designation on ballot do not violate equal protection clauses of State or Federal Constitutions, despite claim that statutes operate individually and in concert to create unfair advantage for judicial incumbent; statutes are justified by legitimate considerations of assuring able, independent and stable judiciary while at same time requiring incumbent judges to submit to voter appraisal in open election. M.S.A. §204B.36, subds. 4, 5; M.S.A. Const. Art. 1, § 2; U.S.C.A Const.Amend. 14.

SYLLABUS BY THE COURT

Minn. Stat. §204B.36, subd. 4, (1990), prescribing the form of the ballot used in judicial elections, and Minn. Stat. §204B.36, subd. 5 (1990), mandating the "incumbency" designation on the ballot, do not violate the equal protection clause of the fourteenth amendment of the United States Constitution or Minn. Const. art. 1, §2. *Gustafson v. Holm*, 232 Minn. 118, 44 N.W.2d 443 (1950), reaffirmed.

Roger A. Peterson, Therese M. Dosch, Minneapolis, for petitioner.

Jocelyn F. Olson, Asst. Atty. Gen., St. Paul, for Secretary of State.

Richard D. Hodsdon, Washington County Atty.'s Office, Stillwater, for Washington County Auditor.

John E. Grzybek, St. Paul, Minnesota.

Deborah Gilman, Civil Liberties Union, Minneapolis, for amicus curiae Minnesota Civil Liberties Union.

Heard, considered and decided by the court en banc.

YETKA, Justice.

On September 1, 1992, Roger A. Peterson, a candidate for the office of Associate Justice of the Minnesota Supreme Court, filed a petition pursuant to Minn. Stat. §204B.44 (1990) invoking the original jurisdiction of the supreme court[1] and seeking a judicial declaration of the unconstitutionality of Minn. Stat. §204B.36, subds. 4, 5 (1990). This opinion confirms the order filed on September 23, 1992 denying the petition.

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[1]The Honorable Harold W. Schultz, Retired Judge of the District Court, appointed as acting Associate Justice pursuant to Minn. Const. art. 6, §§ 2 and 10, and Minn. Stat. §2.724, subds. 1, 2 (1990), and the members of this court who have not exercised their right of recusal have concluded that it is not only appropriate, but necessary in fulfillment of our judicial responsibility to hear and decide this controversy. The circumstances relating to the term of office of each participating justice and the operation of Minn. Stat. §§ 490.121, subd. 12 and 490.125 (1990), the mandatory judicial retirement law, make certain the fact that not one member participating in this proceeding will ever stand again for judicial election in the State of Minnesota and that, accordingly, there can be neither the potential for nor the perception of a conflict of interest.

On July 15, 1992, petitioner filed an affidavit of candidacy, identifying the office of associate justice now held by Associate Justice Sandra S. Gardebring as the particular office for which he is a candidate. Minn. Stat. §204B.06, subd. 6 (1990).[2] The *gravamen of this petition, filed 48 days later,* is that the form of the ballot used in judicial elections, as defined by Minn. Stat. §204B.36, subd. 4,[3] and the incumbency designation mandated by Minn. Stat. §204B.36, subd. 5,[4] operate individually and in concert to create an unfair advantage for the judicial incumbent. This advantage, petitioner contends, is not only inconsistent with the letter and spirit of Minn. Stat. §204B.35, subd. 2,[5] but

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[2] Minn. Stat. §204B.06, subd. 6 provides in pertinent part:

> An individual who files as a candidate for the office of associate justice of the supreme court, *** shall state in the affidavit of candidacy the office of the particular justice or judge for which the individual is a candidate. The individual shall be a candidate only for the office identified in the affidavit. Each justice of the supreme court *** is deemed to hold a separate nonpartisan office.

[3] Minn. Stat. §204B.36, subd. 4 provides as follows:

> The official ballot shall contain the names of all candidates for each judicial office and shall state the number of those candidates for whom a voter may vote. The title of each judicial office shall be printed on the official primary and general election ballot as follows:
>
> (a) In the case of the supreme court: "Chief justice (or associate justice) - supreme court (last name of incumbent) seat";
>
> (b) In the case of the court of appeals: "Judge - court of appeals (last name of incumbent) seat";
>
> (c) In the case of the district court: "Judge - (number) district court (last name of incumbent) seat"; or
>
> (d) In the case of the county court: "Judge - (number) county court (last name of incumbent) seat."

[4] Minn. Stat. §204B.36, subd. 5 provides as follows:

> If a chief justice, associate justice, or judge is a candidate to succeed again, the word "incumbent" shall be printed after that judge's name as a candidate.

[5] Minn. Stat. §204B.35, subd. 2 provides as follows:

> Ballots shall be prepared in a manner that enables the voters to understand which questions are to be voted upon and the identity and number of candidates to be voted for in each office and to designate their choices easily and accurately. The name of a candidate shall not appear on a ballot in any way that gives the candidate an advantage over an opponent, including words descriptive of the candidate's occupation, qualifications, principles, or opinions, except as otherwise provided by law.

also is violative of the equal protection clause of the fourteenth amendment of the United States Constitution and Minn. Const. art. 1, §2.[6]

The petitioner's challenge is to the essence of the traditional judicial election process and, while he is now a candidate for judicial office, the claims asserted have no specific relation to his candidacy. In that context and upon a contention by the respondent secretary of state, we first address the timeliness of the petition.

The very nature of matters implicating election laws and proceedings routinely requires expeditious consideration and disposition by the courts facing considerable time constraints imposed by the ballot preparation and distribution process. As a result, we have examined applications for relief not only on their merits, but also from the perspective of whether the applicant acted promptly in initiating proceedings. *See Mattson v. McKenna*, 301 Minn. 103, 222 N.W.2d 273 (1974).[7]

The petitioner claims to have been unaware of the fact that the ballot form would include an incumbency designation until he received his absentee ballot in late August 1992; yet, that designation has appeared on every judicial election ballot on which a sitting judge has sought reelection since 1949.[8] Moreover, issues substantially similar to those raised herein were addressed and decided in 1950 in *Gustafson v. Holm*, 232 Minn. 118, 44 N.W.2d 443 (1950). Under those circumstances, we are not persuaded that petitioner, who allowed 48 days to elapse

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[6]Minn. Const. art. 1, §2 provides as follows:

> No member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgement of his peers.

[7]*See also Marsh v. Holm*, 238 Minn. 25, 28, 55 N.W.2d 302, 304 (1952); *Moe v. Alsop*, 288 Minn. 323, 331, 180 N.W.2d 255, 260 (1970); *Parsons v. Hickey*, 294 Minn. 537, 539, 201 N.W.2d 150, 152 (1972).

[8]*See* Minn. Stat. §205.82 (1950); *Gustafson v. Holm*, 232 Minn. 118, 44 N.W.2d 443 (1950).

from the time of filing his affidavit of candidacy to the filing of his petition, acted with dispatch in asserting a challenge to legislation which has existed in various forms but in substantially similar design for over 40 years.

Nevertheless, because of the nature of these proceedings, we have chosen to address the merits of this broad challenge to the traditional judicial election process. Specifically, petitioner contends that the designation on the ballot by entitlement as the "(name of incumbent) seat," coupled with the descriptive word after the incumbent candidate's name, violates equal protection constitutional guarantees by creating and preserving to the incumbent an unfair advantage. Further, he urges the court to invalidate statutes which purport to treat judicial incumbent candidates differently from any other candidates for public office in the State of Minnesota. In our analysis of this focal issue, we take the opportunity to identify the historical underpinnings and to trace briefly the evolution of this judicial election process.

The methods by which the federal system and other states initially select and then elect or retain judges are varied, yet the explicit or implicit goal of the constitutional provisions and enabling legislation is the same: to create and maintain an independent judiciary, as free from political, economic and social pressure as possible so judges can decide cases without those influences. That that goal guided the framers of the federal constitution to grant life tenure to judges is evidenced by the writings of Alexander Hamilton[9] which expressed his concern that life tenure would provide judges sufficient security to allow them to rule with their consciences and according to the constitution, rather than to bow to political notions. While the framers

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[9]For example, in The Federalist No. 78, at 484 (G.P. Putnam Ed. 1923),

"As nothing can contribute so much to its [the judiciary's] firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution and, in a great measure, as the citadel of the public justice and the public security."

of our state constitution have developed a system of selection and election quite different from that federal scheme, they too, designed a plan to recognize the uniqueness and independence of the state judiciary.

As early as 1857, those who attended the two separate state constitutional conventions[10] devoted considerable debate to the process by which the judiciary was to be selected and concluded that the now-recognized goal of distinguishing judicial elections from elections for other offices could best be accomplished by providing judges with 7-year terms.[11] In practical effect, because the length of term differed from that of other elective offices, judicial elections were held at times other than those routinely scheduled for those other offices. However, after 1883, when the term was reduced to 6 years,[12] the difficulties associated with partisan judicial elections became more evident. Thus, the selection debate resurfaced in significant respects in 1912 when the legislature enacted separate, nonpartisan ballot legislation;[13] in 1948 when a special constitutional convention composed of public and legislative members recommended wholesale revisions to the judicial article of the state constitution, detailing, among other practices dealing with regulation of the judiciary, a comprehensive scheme for elections

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[10] In Minnesota, there were two constitutional conventions, one held each by the republicans and by the democrats. The product of those separate meetings were two constitutional drafts which, through the process of compromise and negotiation, were consolidated and then submitted to the voters for ratification. *See, e.g.*, M.S.A. Const., *Territorial Existence & Constitutional Statehood*, at 151-52 (1976).

[11] Minn. Const. art. 6, §3 (1857) provides:
"The judges of the supreme court shall be elected by the electors of the state at large, and their term of office shall be seven years, and until their successors are elected and qualified."

[12] Amendment to art. 6, §3, proposed by 1883 Gen. Laws, ch. 3, and adopted at the general election of 1883; 1885 Gen. Laws, p. 2.

[13] 1912 Extra Session Laws, ch. 2.

when an incumbent is seeking reelection;[14] in the 1949 statutory

[14]While no constitutional amendments were approved in response to the committee's report, the proposals for new sections 9, 10, 12, and 13 of the judiciary article demonstrated the problems facing judges during the election process and proposed solutions.

Sec. 9. Terms of Office; Election, Vacancies; Re-election. *The term of office of all supreme court justices and all judges shall be six years and until their successors are qualified, and they shall be elected by the electors of the state, district, county, municipality, or other territory wherein they are to serve. Where more than one position on the same court is to be filled at an election and an incumbent is eligible to be a candidate to succeed himself, each candidate shall specify and the official ballot shall show, the position for which he is a candidate.*

The legislature may provide that a vacancy in the office of justice of the supreme court shall be filled by appointment by the governor from a list of three persons nominated by a non-partisan judicial commission created by law. A person so appointed shall serve until his successor is elected for a six-year term at the first general election held more than one year after the occurrence of the vacancy, and when a justice once has been elected and is a candidate for re-election for the next and succeeding terms, the vote shall be on the question whether he shall be continued in office.

Comment: A uniform term of office of six years is recommended for all judges.

The method of selection provided in the second sentence has been in successful operation in Ohio. Where several incumbents are running for re-election, each should stand or fall on the basis of his own record. The present system does not permit this since opposing candidates run against the field.

While judges in this state are now elected, the usual practice has been that judges first ascend the bench by appointment by the governor on a vacancy occurring. The voters, with some exceptions, have on succeeding elections returned the judges to the bench. The second paragraph of this proposed section authorizes the legislature to put this practice on a formal legal basis with the provision added that the governor shall make his appointment from recommendations received from a nonpartisan commission. This method of selection has been in operation in Missouri since 1941. The electorate there has twice approved it, once by adopting it as a constitutional amendment and again by refusing to repeal it. It is also in operation in California in modified form. It is the method of selection recommended by the American Bar Association. For a description of the plan and its successful operation in Missouri, see article by Justice Douglas of the Missouri Supreme Court entitled, "Missouri Plan Works Well in Actual Results" in 33 Am.Bar Assn.Jr. 1169 (1947). The plan has been modified here to become operative only when an appointed judge has once been chosen in competition with other candidates at a general election.

Sec. 10. Terms Extended. *When a justice or judge attains the age of 67 years during his term of office for which elected, such term is hereby extended until the date of his compulsory retirement under Section 12.*

Comment: The commission feels that when a judge is within three years of the retirement age, he should be permitted to continue in office without standing for reelection.

Sec. 12. Retirement. *Supreme court justices, district and probate court judges shall be retired upon reaching the age of 70 years. When the administrative council certifies to the governor that it appears that any such justice or judge*

amendments involving the forerunner of the statutory provisions here at issue;[15] again in the 1956 constitutional amendments to article 6, sections 8, 10 and 11;[16] and, finally, in 1972

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is so incapacitated as substantially to prevent him from performing his judicial duties, the governor shall appoint a commission of three persons to inquire into the circumstances. On their recommendation the governor may retire such justice or judge from office. Retirement allowances for a justice or judge retiring hereunder who has held judicial office continually for ten or more years immediately preceding his retirement shall be provided by law.

Comment: The source of this section is the recent constitution adopted in New Jersey. See its judiciary article, Section VI, subd. 3 and 5. New York also has a compulsory retirement age of 70 years. This age is also the most commonly accepted one in voluntary retirement plans.

Sec. 13. Appointment. *If the office of a justice or judge becomes vacant, except as otherwise provided by section 9, the governor shall appoint a qualified person to fill the vacancy to hold office until his successor is elected and qualified. This successor shall be elected at the first general election held more than one year after the occurrence of the vacancy and his term of office shall be six years and until his successor is qualified.*

Comment: This section increases the spread between appointment and the appointee's subsequent candidacy for election from 30 days to one year. The 30-day period, as provided in the present Section 10, has proved too short. Complications arise when a vacancy occurs after the primary election but more than 30 days prior to the final election. In addition, the short period does not give sufficient time to enable observation of the competence developed by the appointee prior to the election.

The provision that the election shall be for the full term of office incorporates the judicial interpretation given to the present provisions. *See, Enger v. Holm*, 213 Minn. 154; 6 N.W.(2) 101 (1942). Report of the Constitutional Commission of Minnesota, at 42-45 (1948).

[15]Minn. Stat. §205.82 (1950).

[16]Minn. Const. art. 6, §8 (1956) provides:

> The term of office of all judges shall be six years and until their successors are qualified, and they shall be elected in the manner provided by law by the electors of the state, district, county, municipality, or other territory wherein they are to serve.

Minn. Const. art. 6, §10 (1956) provides:

> The legislature may provide by law for retirement of all judges for the extension of the term of any judge who shall become eligible for retirement within three years after expiration of the term for which he is selected and for the removal of any judge who is incapacitated while in office.

Minn. Const. art. 6, §11 (1956) provides:

> Whenever there is a vacancy in the office of judge the governor shall appoint in the manner provided by law a qualified person to fill the vacancy, to hold office until his successor is elected and qualified. The successor shall be elected for a six year term at the next general election occurring more than one year after such appointment.

in a report in which a newly convened constitutional study commission subcommittee recommended the implementation of a "Missouri plan"[17] in addition to a change in the basic structure of the judiciary.

Reflected in the considerable memorials to the recurring debates is the common thread of both public and legislative recognition that judicial elections are unique in this state's comprehensive elective scheme, demonstrating the fact that the powers conferred on the judicial branch differ markedly from those exercised by the other two branches of government.

Article 6 of our constitution vests "[t]he judicial power of the state in a supreme court *** a court of appeals, a district court, and such other courts *** as the legislature may establish." To assure competence in the exercise of the judicial power, the constitution specifies that holders of a judicial office must be "learned in the law." Minn. Const. art. 6, §5. Implicit in this requirement is recognition that those elected as judges will be subject to the restrictive canons of conduct governing the profession of law.[18]

The need for a competent, impartial, and independent judiciary creates, however, certain tensions when the judicial office is an elective office, both in the election process itself and in the performance of the duties of the office. While getting elected may be a not unimportant prerequisite of holding public office, it was felt this prerequisite should not detract from the judicial function to decide cases free from political maneuvering and in

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[17]The Missouri plan has been simply defined as follows:

> Under this plan, when a vacancy in a judicial office occurs, a non-partisan judicial commission submits three names to the governor who appoints one of them to fill the vacancy. After holding office for a limited period, the name of the appointee is submitted to the electorate without a competing candidate on the question: "Shall Judge _____ be retained in office?" If a majority of the votes cast on the question are in the affirmative, the appointee remains in office for a new and full term. If the vote is in the negative, the process is repeated.

Pirsig, *The Proposed Amendment of the Judiciary Article of the Minnesota Constitution*, 40 Minn. L. Rev. 815, 838 (1956).

[18]*See* Code of Judicial Conduct, Canon 7 (1989).

accordance with the law, regardless whether a decision is, at the time, popular or unpopular. To assure a measure of fair-mindedness and impartiality, the legislature, in 1912, decreed that elections for judicial office be nonpartisan.

This tension inherent in the judicial election process was recognized in a committee report to the 1972 Constitutional Study Commission, which urged the adoption of a retention-type election for incumbent judges, commenting:

> The committee also believes that additional qualified lawyers will seek appointment to judicial office under such a method of selection. Under the present system, too many qualified and competent lawyers who are successful practitioners decline to be considered for fear they will give up their practice only to be defeated by a politician with a popular name at some future election.

Judicial Branch Committee Report, Minnesota Constitutional Study Commission, at 24-25 (1972). In its report, the committee testified to the difficulties facing judges who seek reelection and the restrictions placed upon their candidacy:

> No one debates the desirability of having judges responsive to the people. Nevertheless, the public finds it distasteful for judges to become embroiled in politics. They have no platform, they can make no promises, and they must remain completely uncommitted to other persons in politics or any other area of civic activity. It is unbecoming for judges to become so deeply immersed in civic matters that they may be disqualified to consider the merits of the controversial issues. The method of retention at election as proposed in Section 7 [as an amendment to art. 6, the judiciary article] would allow the public to reflect favorably or unfavorably on a judge's competence in office and, thus, retain ultimate control of the judiciary in the hands of the voting public.

Id.

While this state has opted for the election of judges and has declined to adopt a Missouri-type retention plan, it has provided

its own variation of the election process. Section 10 of the original judiciary article provided for the filling of a judicial vacancy, not by special election but by appointment of the governor, with an election to follow at the next annual election occurring more than 30 days after the vacancy happens. In 1972, this provision was amended to provide that an election to succeed the appointee be held "at the next general election occurring more than one year after the appointment."[19] It appears the extension of the time before an election for the office was, in the words of the 1972 subcommittee, "to allow the public to reflect favorably or unfavorably on a judge's competence in office," while, at the same time, "retain[ing] ultimate control of the judiciary in the hands of the voting public." To achieve this purpose, it appears that the legislature considered it appropriate for the ballot to inform the voters which candidate was seeking retention.

The foregoing brief constitutional history amply supports the legislative prerogative of distinguishing judicial elections in manner and form from those legislative and executive elections conducted in the traditional political, partisan sense. It is against this background that the incumbency designations on judicial ballots, enacted in 1949, must be examined. We reach, then, the question before us, namely, whether the distinctive legislative treatment given judicial ballots survives equal protection scrutiny.

The petitioner appears to proceed from the assumption that the level of equal protection scrutiny is an open question with regard to judicial elections. However, the concept of an application of something akin to the rational basis test to judicial election practices is neither new nor novel. While we did not identify it as such in *Gustafson v. Holm*, 232 Minn. 118, 44 N.W.2d 443 (1950), we essentially applied that same rational basis analysis in discussing the historical significance and vital-

[19]The commission determined to leave the power of judicial appointment in the hands of the governor, but added to the committee's recommendation a provision that the governor may fill judicial vacancies created by incumbents not filing for reelection.

ity of the alley system concept, by which each justice holds a separate office or seat, and in discussing the basis for allowing the designation of "incumbent" to identify a present justice seeking reelection.

In *Gustafson*, we stressed the fact that the purpose of these two separate identifications is informational, not to give the incumbent an advantage; the fact that in a particular election this designation may provide the incumbent with an advantage over other candidates does not necessarily invalidate the statute. We reasoned:

> Use of the word "incumbent" following the candidate's name, simply informs the voter of the person who presently holds the position. In assisting voters to cast their votes intelligently for offices unfamiliar to the average voter, it is only a matter of fairness that he be advised who the present judge is. If he then believes that the judge should be retained, he has the opportunity of expressing his opinion by his vote. If he feels that the present judge should be replaced, he has a like opportunity of so indicating his opinion. The underlying purpose of the legislation is to identify the candidate so that the voter will know whom he is voting for. In order to enable the electorate to know who candidates are, it is not always possible to treat all candidates with absolute equality.

232 Minn. at 126-27, 44 N.W.2d at 447.

The *Gustafson* decision did not specifically address the equal protection argument as raised by the petitioner here. However, all of the ingredients are found in the decision to compel its application to reach the conclusion that the statutory ballot form framework withstands scrutiny under our modern rational basis test. We therefore reaffirm our holding in *Gustafson* that Minn. Stat. §205.82 (1950), the predecessor of current Minn. Stat. §204B.36, subds. 4 and 5, does not contravene the equal protection guarantees of the state constitution. A logical extension

and application of the "separate seat" concept of a judicial office is that the legislature is authorized to select a manner of identification of that seat which promotes and clarifies the distinction between the separate offices. Similarly, that same "incumbency analysis" supports a conclusion that the continued use of the term "incumbent" to denote the person who presently holds the office for purposes of informing the voter is no less valid today than it was in 1950. We noted in *Gustafson*, the designation is—

> intended for the benefit of the voter, not the candidate. Even though the candidate indirectly may derive some benefit from such identification, it does not follow that the legislation is unconstitutional.

232 Minn. at 127-128, 44 N.W.2d at 448. *See also Dougherty v. Holm*, 232 Minn. 68, 44 N.W.2d 83 (1950).

In *Ulland v. Growe*, 262 N.W.2d 412 (Minn. 1978) *cert. denied. sub nom. Berg v. Growe*, 436 U.S. 927, 98 S.Ct. 2822, 56 L.Ed.2d 770 (1978), the constitutionality of a statute governing ballot placement of candidates for legislative or executive partisan office was challenged by plaintiff, who as an independent candidate pointed out that he would never have his name appear first on the ballot. This court held that the ballot classifications were not without a rational basis and, this being so, it was not this court's role to interfere. We quoted with approval from *Clough v. Guzzi*, 416 F.Supp. 1057, 1068 (D.Mass. 1976):

> The fact that some statistical advantage may at the same time accrue to one of the candidates by virtue of his or her incumbency does not for constitutional purposes invalidate that otherwise legitimate purpose, especially where that advantage remains problematic and variable from election to election. And whether for purposes of a more absolute fairness that advantage warrants a different statutory scheme is properly a legislative consideration.

262 N.W.2d at 418.

Recognizing the quite different role the judicial branch plays in our government, the legislature has historically treated judicial election ballots differently from ballots for other elective offices. The reason for this different treatment is evident from the history of the judiciary article in our constitution, its statutory implementation over the years, and past judicial precedent. Whatever advantage there may be to the incumbent from the incumbency designation on the ballot, it is clear that the overriding purpose of the ballot designation has been to assure an able, independent and stable judiciary while at the same time requiring incumbent judges to submit to voter appraisal in an open election. These are legitimate considerations which satisfy the equal protection clause of our state constitution as well as the federal constitution.

The task of the voter in considering candidates for judicial office is a difficult one, made more difficult by the nature of the office itself—a position that requires its holder to studiously avoid partisan politics, to refrain from all discussions of public issues and to restrict one's membership and participation in organizations to those primarily of a professional nature. The incumbency designation is but one means by which the voter can be informed that the individual seeking reelection offers to the voters as a qualification for candidacy that fact of present judicial service.

It seems clear that Minnesota has adopted its own middle-of-the-road approach to judicial selection. The open election process has been retained, but with a quasi-retention feature which simply informs the voter, without comment, who is the incumbent candidate whose performance is under review and who is the non-incumbent challenger. This arrangement acts as a check on the gubernatorial appointment process by keeping the ultimate choice with the voters, while at the same time recognizing the unique independent nature of the judicial function.

This approach is authorized by our constitution as it has developed over the years, and its features, as we have demonstrated and previously held, do not violate the equal protection process of either the federal or state constitution.

Petition denied.

KEITH, C.J., and TOMLJANOVICH and GARDEBRING, JJ., took no part in the consideration or decision of this matter.

(Case as appeared in Advance Sheet for North Western Reporter.)

STATE OF MINNESOTA
IN SUPREME COURT

ROGER A. PETERSON,

Petitioner,

vs.

R.H. STAFFORD, Washington
County Auditor,

and

JOAN ANDERSON GROWE,
Secretary of State,

Respondents.

PETITION FILED PURSUANT TO MINNESOTA STATUTE 204B.44

TO: The Supreme Court of the State of Minnesota:

COMES NOW PETITIONER, Roger A. Peterson, pursuant to Minn. Stat. §204B.44, and states and alleges as follows:

1. Petitioner is a citizen of the State of Minnesota, a registered voter of Washington County, Minnesota and an attorney licensed to practice law in the State of Minnesota. That he in all respects meets each and every requirement of the statutes and Constitution of the State of Minnesota to be a candidate for justice of the Supreme Court of Minnesota.

2. Respondent, R.H. Stafford is the County Auditor for Washington County, Minnesota. That Respondent Stafford is the Washington County official responsible for ensuring that the ballots are printed for the general election to be held November 3, 1992.

3. Respondent Joan Anderson Growe is the Secretary of State of the State of Minnesota.

4. That pursuant to Minnesota Constitution Article 6, 7 all judges are to be elected for six year terms. That the position of chief justice and the position of three associate justices are to be

filled by the general election to be held November 3, 1992. Petitioner, Roger A. Peterson, has filed to run for the position of associate justice of the Minnesota Supreme Court which is currently held by Justice Sandra Gardebring. No other candidate has filed for this position.

5. That Petitioner has obtained a Washington County absentee ballot for the primary election to be held on September 15, 1992 (see attached Exhibit A).

6. That said primary ballot, pursuant to Minn. Stat. §204B.36, subd. 4, lists the title of the two judicial offices in which more than two candidates have filed as the current justice's seat. That said primary ballot, pursuant to Minn. Stat. §204B.36, subd. 5, lists the word "Incumbent" after the name of the chief justice or associate justice who is a candidate to succeed again. The ballot appears as follows:

CHIEF JUSTICE
SUPREME COURT
(KEITH SEAT)
(VOTE FOR ONE)

ROSS A. PHELPS

MICHAEL C. DEMOSS

A.M. (SANDY) KEITH Incumbent

ASSOCIATE JUSTICE
SUPREME COURT
(YETKA SEAT)
(VOTE FOR ONE)

ALAN C. PAGE

EDWARD W. BEARSE

KEVIN JOHNSON

7. That upon information and belief, Petitioner believes that pursuant to Minn. Stat. §204B.36, subd. 4, the ballots for the general election will designate the position he has filed for as the seat belonging to the justice currently on the bench.

8. That upon information and belief, Petitioner believes that pursuant to Minn. Stat. §204B.36, subd. 5, the ballots for the general election will designate the justice against whom he has filed as "Incumbent".

9. Petitioner alleges that Minn. Stat. §204B.36, subd. 4 denies him, and all parties similarly situated, Equal Protection and Due Process guaranteed by the Fourteenth Amendment of the U.S. Constitution and Article 1, 2 of the Minnesota Constitution.

10. Petitioner alleges that Minn. Stat. §204B.36, subd. 5 denies him, and all parties similarly situated, Equal Protection and Due Process guaranteed by the Fourteenth Amendment of the U.S. Constitution and Article 1, 2 of the Minnesota Constitution.

11. Petitioner alleges that any designation of a position as the seat of the justice currently holding the position and identifying that justice as an incumbent provides an advantage to the justice over the challenger in violation of Minn. Stat. §204B.35, subd. 2 and the Minnesota Constitution.

12. Petitioner alleges that the designation of the contested position as a particular justice's seat and the designation of the current justice as "Incumbent" as required by Minn. Stat. §204B.36, subds. 4 and 5 do not in any way serve to clarify the position for election, because there is only one chief justice in Minnesota and because each candidate files for a specific associate justice seat and must designate the seat at the time of filing.

13. Petitioner alleges that the designation of the seat on the ballot as a particular justice's seat as required by Minn. Stat. §204B.36, subd. 4, connotes a possessory interest in the seat

and, without serving any purpose to the voter, provides that the name of the justice currently holding the seat appears twice on the ballot.

14. Petitioner alleges that Minn. Stat. §204B.36, subds. 4 and 5 are unconstitutional, in that the designation of the seat by the name of the justice and the designation of incumbency provides an advantage to the sitting justice in violation of the conduct of a fair election as required by the Minnesota and United States Constitutions and a violation of Minn. Stat. §204B.35, subd. 2.

15. Accordingly, Petitioner seeks an Order of this Court as follows:

(a) Declaring Minn. Stat. §204B.36, subd. 4 and Minn. Stat. §204B.36, subd. 5 to be unconstitutional.

(b) Ordering Respondent Growe to order all County Auditors in the State of Minnesota to strike from all ballots the designations specified in Minn. Stat. §204B.36, subds. 4 and 5.

(c) Such other relief as is just and appropriate.

This petition is based on the facts and law set forth herein, the attached Affidavit of Petitioner dated August 31, 1992 and a forthcoming brief citing additional authority and argument.

Dated this _____day of _____, 1992.

RESPECTFULLY SUBMITTED,
PETERSON, ENGBERG & PETERSON

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NONPARTISAN PRIMARY BALLOT

Hennepin County Minnesota

September 15, 1992

INSTRUCTIONS TO VOTERS
TO VOTE, COMPLETE THE ARROW POINTING TO
YOUR CHOICE LIKE THIS

COUNTY OFFICES

SUBURBAN REGIONAL
PARK COMMISSIONER
DISTRICT 3
FOUR YEAR TERM
(vote for one)

- John W. (Jack) Gausman
- Jason F.M. Moede
- Marcia Vesely Taubr

JUDICIAL OFFICES

CHIEF JUSTICE
SUPREME COURT
(KEITH SEAT)
(vote for one)

- A.M. (Sandy) Keith INCUMBENT
- Ross A. Phelps
- Michael C. Demoss

VOTE BOTH FRONT
AND BACK OF BALLOT

Ward _____ Precinct _____

_____
Judge

_____
Judge

STATE NONPARTISAN PRIMARY BALLOT

Hennepin County, Minnesota
September 15, 1992

INSTRUCTIONS TO VOTERS
TO VOTE, COMPLETE THE ARROW POINTING TO
YOUR CHOICE LIKE THIS

JUDICIAL OFFICES

ASSOCIATE JUSTICE
SUPREME COURT
(YETKA SEAT)
(vote for one)

Kevin Johnson

Alan C. Page

Edward W. Bearse